United States Court of Appeals for the Second Circuit



BRIEF FOR APPELLANT

ORIGINAL 76-7293

To be argued by ARTHUR M. BOAL

13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD IMANUEL,

Plaintiff,

-against-

LYKES BROS. STEAMSHIP CO. INC.,

Defendant and Third-Party Plaintiff-Appellant,

-against-

TODD SHIPYARDS CORPORATION,

Third-Party Defendant-Appellee.

APPELLANT'S BRJEF

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-against-

TODD SHIPYARDS CORPORATION,

Third-Party Defendant-Appellee

NATURE OF THE CASE

This is an appeal from a judgment of the District Court, (Palmieri, D.J.) in favor of the Appellee (hereinafter referred to as TODD), in an action for an indemnity for Todd's failure to perform certain repairs on the SS NANCY LYKES in a careful and workmanlike manner.

The plaintiff, second electrician on the NANCY LYKES, on December 10, 1971 was on the elevator platform in the

engine room when the cables supporting the platform parted causing the platform to drop to the bottom of the elevator shaft. This caused serious and permanent injuries to the plaintiff. The plaintiff's claim was settled for \$325,000.

Judgment for that amount was entered and that judgment was satisfied by the Appellant (hereinafter referred to as LYKES).

It was agreed that settlement was reasonable and proper.

THE ISSUES

The real issue in this case is did Lykes establish a prima facie case for an indemnity against Todd.

The Court in its opinion and findings drew inferences which are not supported by any evidence and refused to draw inferences from undisputed facts which not only justify but require the finding that Lykes did establish a prima facie case against Todd.

THL FACTS

The SS NANCY LYKES had an elevator in her engine room intended and used for the carriage of stores and not personnel. It was in a shaft which extended from the bottom of the engine room to a point just above the weather deck. It

was 4'6" by 3'6". The elevator platform was 4'0" by 2'9". It had removable sides. There were doors into the shaft at each level in the engine room.

There was a control room on the level just below the weather deck. The motors and other electrical equipment and a drum were in the control room.

There were button controls in the control room which would stop the elevator platform at designated levels in the engine room. These buttons would not stop the platform except at the levels.

To stop the platform between levels the push buttons could not be used. Manual operation and control was necessary.

Two cables were attached to the drum and wound in grooves around the drum. These cables extended from the drum to a sheave just below the top of the shaft and from the sheave down the shaft to the platform and then over two sheaves on the underside of the platform and up the shaft on the other side to a point just below the top of the shaft on

the other side to a point where they were anchored.

The plaintiff and Haag were checking the limit switches, and to do this the platform had to be stopped at points in the shaft below each level by manual operation. The other alternative was to rig a bosun's chair and check the switches from that chair. The button controls would stop the platform only at the levels.

The plaintiff was in the control room manually operating the elevator. Haag was on the platform checking the limit switches. When the platform reached a point just below the top limit switch, which was below the top of the shaft, Haag asked the plaintiff to come onto the platform and check the limit switches with him. The plaintiff went up to the weather deck and down to the platform and inspected the limit switch with Haag. Then Haag said he was going to get a meter and check with the meter. Haag got off the platform - he had one foot on the deck and the other in the shaft when the platform dropped. The plaintiff said he heard a GRR-RR noise and in a split second the platform went down. Both agreed it was down in a split second, i.e., there was no hesitation or break in the descent.

The fall of the platform was due to the parting of the cables by which it was suspended. Both cables parted at the same distance from the anchored ends.

The cables were clean, well greased and in good condition except at the point where they parted.

Lykes contends that the cables were damaged by Todd while moving manifolds and other objects into and out of the engine room through the elevator shaft. Inis occurred about a week before the accident while the vessel still was in Todd's Yard, near the end of a five-month period during which it underwent elongation. This contention is based on the following undisputed facts: - these cables received a horizontal blow when they were in a vertical position. This blow caused nicking and flattening of the cables. This could have been done and was in fact done by the movements into and out of the engine room through the elevator shaft of the manifolds, which were 48"x24"x16" and weighed 300 pounds without the bonnets or wheels and 380 with the bonnets. These manifolds were suspended more than 100 feet from the end of the boom of the crane which lifted them and in the manner lifted readily could have swung and caused the damage to the cables. There were fresh horizontal dents in the side of the shaft near the area of the break which could have been caused by a swinging manifold.

There were no tag lines attached to the manifolds to steady them as required by the United States Department of Labor Safety Regulations for Ship Repairing. There was no factual evidence submitted of any other possible cause for the damage which resulted in the parting of the cables.

INTERROGATORIES AND REQUESTS TO ADMIT WERE SUBMITTED TO TODD

In its first answers to interrogatories Todd denied moving any objects into or out of the engine room between December 2nd and December 11th 1971 and repeated these denials in response to Requests to Admit. When confronted with receipts for such work paid for by Lykes and being ordered by the Court to file proper answers, Todd filed supplementary answers in which it admitted that the following objects:

- Regulator Valve.
- 2. Sanitary Pump strainer.
- 3. No.1 and No.2 sanitary pumps.
- 4. No. 2 salt water overboard brine pump.
- 5. Feed pump suction manifold.
- 6. 3" relief valve

were moved into and out of the engine room in December, 1971 but stated that no objects were moved through the elevator shaft. Moreover Todd filed with those answers an affidavit of defense counsel Thomas H. Healey, Esq., in which he stated that Todd had cut and unbolted access openings from the engine room to the adjacent hold and that the

"*** elevator shaft was never used to move materials."

THE USE OF THE ELEVATOR SHAFT BY TODD

On March 25, 1975 because of such false denials Lykes took the testimony of several Todd employees in Galveston in an endeavor to prove the use by Todd of the elevator shaft but unfortunately frustration of its discovery still continued.

One witness, a leaderman, James William Wolfe, testified that he had no knowledge or memory of ever working on the NANCY LYKES, but later admitted that he previously had signed a statement to the contrary and that he had read this statement before he signed it, and later a supplemental statement to it. (Exhibit 21a), in which he again admitted working on the NANCY LYKES and stated that Todd had used the elevator shaft to move and lower materials and equipment.

Lykes also took the testimony of a Todd machinist,

I. Ontiverous, who likewise said he did not remember ever working on the NANCY LYKES, but then was forced to admit that he too had signed a statement (Exhibit 22a) in which he said that he did work on her and that Todd had used the elevator shaft to lower and raise materials, into and from the engine room. The next day (March 26, 1975), Todd capitulated and admitted that the access openings in the engine room to the adjacent hold were closed on or before October 15, 1971 and that materials were moved into and out of the engine room through the elevator shaft in December of 1971, thus admitting that its answers and supplementary answers to the interrogatories and Requests to Admit, all were false.

THE MOVEMENT OF THE MANIFOLDS INTO AND OUT OF THE ENGINE ROOM THROUGH THE ELEVATOR SHAFT.

On June 28, 1975 Lykes then took the testimony of Todd foreman Ed Welsh, who testified that although he did not witness the movements through the shaft he knew that the manifolds had been so raised and lowered by Todd employees at the end of a sling which was more than 100 feet from

the end of the boom of Todd's shoreside crane with no tag lines attached to prevent it from swinging and no protective covering to prevent damage.

THE COURT'S RULINGS

The Court nevertheless ruled in his Conclusions of Law:

60a "2. Lykes has failed to sustain its burden of proof that Todd caused damage to the cables of the engine room lift platform on the SS NANCY LYKES which resulted in their parting on December 10, 1971."

* * *

"5. Todd was not negligent in any respect nor did it breach its warranty of workman-like service."

These two ultimate conclusions of law are erroneous.

Lykes did establish a prima facie case. Under the proof submitted the only possible cause for the parting of the cables was by their being struck by the swinging manifolds as they were lowered into or raised out of the engine room a distance of 60 feet through the elevator shaft. There was no other possible cause for the damage to the cables and there was no conduct on the part of Lykes that in any respect precluded Todd from conducting its services in a workmanlike manner.

In his Findings of Fact that Court misapplied a rule of law. In #15 the Court said:

"With the gantry in plumb position, vertically above the opening, it is reasonable to infer that the lifting or lowering of machinery and repair items was done in a straight up and down fashion. The heaviest object lowered through the shaft by Todd was a manifold weighing about 300 pounds. There is no evidence from which any inferences can be drawn that the manifold or any other objects moved through the shaft by Todd's crane dented the wall of the shaft, touched the cables or interfered in any way with the platform lift equipment." (49a-50a).

These two inferences are clearly erroneous.

The facts and law compelled directly opposite inferences and findings.

No witnesses were called or evidence submitted by Todds from which it could be concluded the lifting and lowering of machinery was done in a straight up and down fashion.

On the contrary such failure by Todd to contradict Lykes' proof required the inference that the manifold or other objects did strike the cables in the shaft causing the damage which resulted in their parting.

ARGUMENT

POINT I

THE UNCONTRADICTED PROOF AND APPLICABLE
LAW REQUIRED A FINDING THAT TODD DAMAGED
THE CABLES AND THUS BREACHED ITS WARRANTY
OF WORKMANLIKE SERVICE

Wrongfully frustrated during two year's of discovery efforts by Todd's repeated false answers to interrogatories and its false denial to requests to admit or deny, Lykes necessarily proved a prima facie case built on circumstantial evidence, to wit:

- a) By the testimony of Imanuel and Haag, that the cables were inspected and in good condition prior to the vessel entering Todd's yard for conversion.
- b) That after Todd's repeated denials its leaderman Welsh admitted that the two manifolds and other heavy objects had been moved through the shaft.
- c) That the manner of Todd's hoisting and lowering the manifolds was unsafe and in violation of the U.S.

 Department of Labor Safety Regulations for Ship Repairing in that no tag lines or padding were provided for protection during the lift.

- d) That examination of the cables after the accident by Lykes' surveyor Brierly and Thompson and its metallurgist Kiste, showed that both cables had been damaged by a horizontal blow at the same time and by the same object which in Kiste's opinion could have been one of the manifolds.
- e) That the testimony of John Peuler and the blowups of photographs of the shaft wall taken shortly after the accident showed fresh horizontal dents near the area where the cables would have been struck by a swinging manifold.
- f) That with the platform stopped at a point sufficiently below the upper level to permit examination of the limit switches, the cables parted just after the platform had for the first time been subjected to the weight of the two men, which load still was many times within their safe working capacity.

For unexplained reasons the Court chose to reject most of such testimony and adopt the opinion of Todd's expert unsupported by any factual testimony.

An examination of the record on each of the above points will show each element of Lykes' proof unimpeached and uncontradicted as follows:

a) THE PRIOR CONDITION OF THE CABLES

The testimony of Imanuel and Haag that they had carefully checked the condition of the cables before the vessel went into Todd's Yard was clear and convincing, accepted by the Court and requires no further comment.

b) and c) THE MOVEMENT OF THE MANIFOLDS THROUGH THE ELEVATOR SHAFT

Lykes took the testimony of Todd's leaderman, Ed Welsh, in Galveston on June 8, 1975. Welsh gave the weight of the manifolds as 300 pounds without the bonnets or wheels and 380 pounds with them. He was not sure whether the bonnets had been removed prior to moving the manifolds. Welsh was in the engine room during the time one of the manifolds was moved across the engine room as far as the door to the elevator shaft preparatory to its being lifted through the shaft, but did not witness the actual raising or lowering of either of the manifolds through the shaft. He testified to and made a drawing (Welsh's Exhibit 8 as part of Exhibit 27) indicating the way the manifold was rigged which shows the shackle attached to the big end.

The manner of the movements that he did not see (those through the shaft) he described as in accordance with Todd's general practice.

A shore crane was used with a boom extending over the ship with its end directly above the shaft. A load block was used and to the load block was attached a sling. To the sling was attached an eye. The sling was dropped into the shaft. The manifold was moved to the door into the shaft on the lowest level of the engine room. It was moved by two chain blocks. When it got to the door of the elevator shaft the manifold was attached to an eye at the end of the sling by a shackle. The tension on the holdback that had been used in bringing it from its position in the engine room to the elevator shaft was released and the manifold was hoisted to a vertical position. As soon as the manifold was in a vertical position the holdback was disconnected and the manifold was kept in a vertical position only by its size and weight.

Welsh specifically testified as follows:

Q Now, do you remember seeing this manifold actually removed from the engine room?

A No, sir, I don't. (196a)

Q Do you remember seeing it taken off these floor plates ?

A Yes, sir. I do recall, because we had to come over the shafting. In other words, the way we had to come out. The reason I do recall this is the mechanic was raising hell because the night shift gets all the dirty work.

Q All right. Tell us how this was done.

A By chain blocks. (196a)

* * *

- Q ----that's what I think I want you to clarify for us. So the connection between your gantry sling and your manifold is made down in the engine room, outside of the shaft, while your manifold is sitting horizontal?
- A In the doorway.
- Q Okay. And you attach your sling to the end of the manifold closest to the doorway, of course?
- A That is correct.
- Q You still have a chain block holding on the other end, the opposite end?
- A That is correct.
- Q Do I understand you to say that a strain is taken on that sling ?
- A On the gantry. (206a)
- Q On the gantry sling ?
- A That is correct.
- Q She starts to raise your manifold. The holdback, is that holding it back? Is the thing maintained under tension the entire time then?
- A Until it's stood up. (207a)

Welsh testified further:

- Q That's what I'm asking you. Now, when she stood up, now, at that point, all the lift is in your gantry, right?
- A That is correct.
- Q What, if anything happens to this holdback?
 Do you let loose?
- A You turn it loose. (Underscoring ours).
- Q All right. Now, take it from there.
 When you've turned loose your holdback --
- A All right.
- Q --- and she's lifting, the question I put to you originally; does your manifold stay in a vertical position --
- A Well, not a perfect vertical but due to the length and the weight and the width, she is almost in a vertical position all the way up.
- Q All right. That's what I was going to ask you.
- A All right. (207a)
- Q And she was maintained in that almost vertical position throughout the lift ?
- A Right, right. That's due to the weight and the length and the width of it. (208a)

It is clear from Welsh's testimony that the holdback used in the engine room was released and that the manifolds were raised and lowered through the shaft without tag lines or padding in violation of the U.S.Department of Labor Safety Regulations for Ship Repairing, Section 1501.66.

The condition of the cables after the accident indicated that both had been struck horizontally and at the same time and by the same object.

The surveyor, Brierly, who examined the shaft and cables the day following the accident, stated in his report (Exhibit 16):

"The break in the cables was examined and they appeared to be straight across, as though the cable had been cut. One single strand was pulled out of the cable and extended approximately 12" to 15" beyond the remainder of the broken cable ends. * * *

The external visual appearance of the cable, drum, motor and sheave, insofar as examined at this time, appeared in satisfactory condition. No 'fish hooks' or other broken strands of cable could be seen at this time."

In his testimony Mr. Brierly stated:

"Well, when I examined the end of the cables, it looked to me like the cables had been cut; I don't know how or why, but just appeared to be cut.

- Q Looked as -- did it look as though they had both been cut at the same time ?
- A Yes.

Q How close are these cables to each other as they hung in the elevator shaft ?

A They were parallel to one another, and as well as I recall, quite close together. (140a)

As to the cables on the drum he testified:

"the lays of the cable on the drum were all even; in other words, they hadn't jumped or criss-crossed. (141a)

* * *

Q What was the condition of the cable as you saw it on the drum ?

A They were - I saw no evidence of rust;
I saw no evidence of what we call fish
hooks. I just found that the cables were
well greased. (141a)

* * *

Q What I'm saying, did it look to you as if that cable had been severed with a blow "

A Yes, sir.

Q Because you have described the cut as the same, right ?

A Yes. (148a)

* * *

Q And you found that those cables were completely cut through except for this one 12-to-15 inch strand that was hanging out; the other was a clean cut through both cables?

A Uh-huh. Well, now it's not as if it was cut, but it parted even, yes. (149a)

- Q Now aside from that, I think you told us the cable appeared to be normal?
- A Yes, sir.
- Q All right. You found no evidence of any other stress or blows or whatever you call it, scraping?

A No. We would be looking for kinks or rust.

- Q That's what I'm saying. You found nothing like that?
- A No, sir. (150a)

London Salvage surveyor, Thompson, stated in his report:

"The undersigned was unable to find any mechanical fault which could have resulted in failure of the elevator cable and can only suggest the possibility that during the course of the recent conversion at Galveston, Texas, materials had been removed from the vessel through the elevator shaft and that the cables had been damaged at that time resulting in final failure on December 10, 1971." (171a)

Further, in his testimony, Thompson stated:

Q What did you observe with respect to the condition of the cables as far as their condition if anything ? (162a)

A When it was still on the drum and when we had it in the Dixie Machine Shop, when they were laid out for examination, they appeared to be in good condition.

Q Were the cables on the drum, how welle they lying on the drum?

A The drum itself was grooved to take, so that the cabling is led into the drum, and they were all lying right within the grooves. (163a)

* * *

- A The cables, except for the breaks were found in apparently good condition, without readily visible broken wires or frays; both cables were broken at a point 16 feet 07 inches from the top. The ends of the break were not frayed, neither was there evidence of much untwining. The breaks appeared to be relatively clean and not resultant upon fatigue.
- Q Mr. Thompson, will you describe for us under what conditions you inspected the cable itself?
- A Well, the first day, on the 14th, I inspected the cables when they were still within the elevator shaft, with the two attached to the bitter ends. (165a)

Mr. Peuler testified that he examined the cables on December 15, 1971, had them taken to the plant of the Dixie Machine Works and from there he took them to Lykes' warehouse and from there he delivered them to the New Orleans office of the Pittsburgh Testing Laboratory which in turn sent them to its Pittsburgh office. The cables

were moved in a covered wooden box. In this box they could not have shifted or sustained any damage.

Kiste, the only metallurgical expert who testified, conducted a very careful scientific examination of the cables which were sent to him. He testified:

Q And what type of wire rope was this?
A This examination was of a 5/16th inch
diameter wire rope. My examination shows
that it was, had the following types of
characteristics, which I outlined.

Wire rope diameter, .323 inches. Number of strands 8. Number and nominal diameter of wires per strand, outer layer 9, at .022 inches; inner layer, 9 wires at .012 inches; a core wire of .027 inches. This would be determined a class 8 x 19 Seale construction. The type of core was of fiber core; the lay was of right regular with a lay length of 2 inches. It was not galvanized and it was of preformed construction. (215a)

* * *

Now, then, would you refer to your report and tell us the procedures you went

A Yes. After identifying the tape and character of the wire rope I proceeded to take seven photographs of each wire, wire rope No.1, and another seven on Rope No.2. They are the same type of photographs. They duplicate, one duplicates the other. That is, on

figure No.1 and 2, I showed the top and bottom lengths of wire rope as I received them in my laboratory. That is figure 1 and figure 2. (223a)

After stating the methods of his examination, testing and photographing the cable in detail, he testified:

- Q After photographing these sections or in the course thereof, did you make a visual inspection of these sections?
- A Yes.
- Q You did this personally ?
- A Yes.
- Q And what were your findings in those respects?
 A I observed that there were nicking and
- flattening at the fracture site of the outer layer wires and --
- Q Excuse me, are your findings expressed in your report, sir ?
- A Yes.
- Q Could you refer to it; are you reading from your report or ---
- A I am using it as a reference. This would be on page 4.
- Q Thank you.
- A And abrasion and flattened areas was also observed. (228a)

After describing examinations of various strands, Kiste further testified:

- Q Did you examine each and every strand of those wires?
- A Yes, I did,
- Q Are those your findings with respect to each and every strand?
- A Yes. This is typical of what I observed. (231a)

* * *

After referring to various photographs, Kiste testified:

"Flattening is shown on the wires to the left, to the underneath side of individual wires of this one strand which is one of eight which comprises the wire rope, and a flattening which would result from impact is shown here.

"At the break end, there is severe notching of and nicking of the wires. These wiresthe wires I refer to -- are approximately
.022 inches in diameter; and in many cases, the nicking extends directly through the wires and there is also flattening in this area." (232a)

* * *

- Mr. Kiste, I believe you previously described the type of damage you found at the point of fracture, and is that the damage, the type of damage that you testified to in respect to the photographs that are attached to your report --
- Q --- and did you find the same type of damage in both Lykes Exhibits 39 and 40 ?
- A Yes, I did.

Yes.

- Q Could you tell by your observation of that damage, the angle of impact to the wire' in other words, the angle that the impact to the wire caused these findings of yours?
- A Yes.
- Q What would that be ?
- A The impact was approximately horizontal to the vertical axis of the wire ropes.
- Q Could you tell us how you determined that ?
- A Yes, by the type of nicking and crushing evidence at the site of the fractures.
- Q Did you make the same findings with respect to both 39 and 40 ?
- A Yes.
- Q You have been in the courtroom for the last several days, Mr. Kiste. (234a and 235a)
- A Yes.
- Q Do you recall, among other things, that he testified that various heavy objects were moved up and down through the shaft, through the elevator shaft on the NANCY LYKES?
- A Yes.
- O Do you recall that he testified as to the weights of those various objects, some as low perhaps as 40 pounds; and some, particularly the manifold, as high perhaps as 300 or maybe 380 if the bonnets were attached?
- A Yes.
- Q I show you Lykes Exhibit 12, which is a photograph of such a manifold, removed or installed on the NANCY LYKES. Did you hear the testimony of the metallic construction of this manifold?
- A Yes.

Q My recollection is it was a heavy metal, steel or some alloy.

MR. HEALEY : Monel ?

MR. WYLY : I believe it was testified it was bronze. (236a)

- Q In your opinion, Mr. Kiste, could the damage that you found to Wires 39 and 40 have been caused by impact from a metal like object of the weight testified to in the deposition of Mr. Welsh, the manifold, of 300 or more pounds, and of the composition; could impact with such a metallic object have caused the damage that you observed to the wires? Yes.
- Q Is your answer that it could have? A Yes, it could have. (237a)

e) DENTS IN THE SHAFT WALL

Mr. Peuler testified that he observed two fresh dents in the area of the shaft approaching the point at which the cables could have been cut. Although they appear in photographs taken on that date (Lykes Exhibit 7) he did not then realize their significance. During March, 1973 the dents, (now rusted), were rephotographed and blowups thereof were marked at the trial. (Lykes Exhibits 31 and 32).

In describing these marks as he saw them the first time he said:

"The first mark was approximately 3 to 4 inches long. It was located approximately 6 inches I'd say from the corner of the shaft. It was an indentation into the metal of the shaft, and it was shiny and appeared to be a mark that was recently made."

- Q Were there any indications of rust on that mark?
- A No, there wasn't. There may have been very slight traces, but nothing, nothing much. It did appear to be a fresh mark that had just been made recently.
- Q And the second mark that you examined, the ones that you circled below, what were your observations in that respect ?
- A The second mark was a little bit further from the corner, maybe 6 1/2 to 7 inches. It was also about 3 inches long and was an indentation into the metal and the second mark, again, appeared to be shiny and appeared to have been made recently. (255a)

f) THE ACCIDENT

Haag and Imanuel, the electricians, were checking the limit switches.

The plaintiff, Imanuel, was in the control icom. He could not use the button control because that would stop the platform at engine room levels. The limit switches were

below those levels. In this way they checked the limit switches up to the top one which was below the top of the shaft. After examining this limit switch Haag called Imanuel to come onto the platform and check the switch with him. Imanuel left the control room, went to the weather deck and stepped down onto the platform and examined the limit switches with Haag. Haag then left the platform to get a meter. He had one foot on the deck and one still in the shaft when the platform fell.

Both Imanuel and Haag testified that it fell in a split second.

The Court in Finding #18 stated:

"Immediately before the accident the lift was at the uppermost limits at the top of the shaft. The testimony of plaintiff Imanuel and Chief Electrician Haag that the lift platform was about two feet below the upper limit switch just before the accident is rejected by the Court as inaccurate and inconsistent with the credible evidence." (50a)

Haag testified:

- Q Were you working on the highest limit switches at the time of the accident ?
- A Yes, sir. That was the final step.
- Q No limit switches up above you ?
- A No.

- Q I assume you checked out all the lower limit switches.
- A Yes, they were completed. (122a)

* * *

- Q You had Leonard move you manually up, so you could get at the highest limit switches?
- A Yes.
- Q I assume you shouted stop ?
- A Yes.
- Q He stopped the car ?
- A Yes.
- Q At this point then, the car, as I understand your testimony, would be slightly lower than the ordinary stopping position at that level, is that correct?
- A Correct.
- Q How much lower ?
- A Perhaps a foot or two; a foot and a half.
 It was just low enough where I could
 easily step out of it. Normally it would be
 flush. So I actually stepped down. This
 way I stepped up and over.
- Q To get on to the deck?
- A It was about a foot or 18 inches below where it should be. (123a)
- Q Is that the normal way to check the limit switches in your experience, by riding the car up and down?
- A It was my normal way. Any other way would be to rig a bosun's chair, which would require too much time, and actually be dangerous. (124a)

* * *

- Q Now, after Leonard stopped the car at your command on this last limit switch, did you call for him to come to you?
- A Yes.
- Q The car remained stopped ?
- A Stopped in one position.
- Q Once he lets that relay open up, the braking device on the motor is activated?
- A No. It's deactivated. It's a mechanical brake. The minute he leaves his hand off that that brake sets.
- Q When the electric circuit does not run through the brake the brake is activated ?
- A The brake opens through electricity.
 Without electricity it's always closed.
 (125a).

* * *

- Q How long were both of you in the car before the accident?
- A A minute or two
- Q What were you doing ? (126a)
- A We were just visually examining the limit switch after we had the blade off, to see if the thing is making connections. (127a)

* * *

- Q After a minute or two, when you and Leonard were checking those last limit switches, I understand you left the car?
- A Yes.

- Q What were you going to do ?
- A To get a meter to check the continuity on that particular switch. (127a)
- Q Was it, at this point, that the accident happened?
- A With one foot on deck, that moment, when my foot was on deck, the car left.
- Q The car fell down the shaft to the bottom, is that right?
- A And him standing straight up looking at me. (128a)

Imanuel testified:

- Q And the time the accident occurred, were you in the elevator coming up?
- A No, I was in the control room, and after the elevator reached the top, Herman called me up. So we decide to check on the limit switch. So Herman opened the plate. So we look at it. He said, 'Take a look at it, Leonard.' I got in the elevator; I took a look. 'I can't see anything wrong, Herman.'

 But Herman said, 'Of course, you can look with your eyes, but let me get the meter.' As he stepped out to get the meter, his one foot was partially actually in the elevator yet, all of a sudden I heard a big noise, and here I was going down. (95a)

* * *

- Q And then he came up to the main deck and got in the elevator car with you?
- A Yes, he did.

- And he started to work with you for a minute or two, and then he stepped out and the elevator fell?
- A That is when it fell, yes, sir. (95a)
- Q Is that the way it happened at the time?
 A I was at first in the elevator. Then
 Herman went and as he went up, then I
 went with Herman in the elevator. We
 opened the limit switches. As we open
 it, we can't see anything wrong by eyes
 and Herman say, 'Let me get the meter,'
 and this is how it happened, sir.
- Q The time that the accident happened, when you fell, had you come up in the elevator?
- A No, Herman had come up, Herman.
- Q And you were operating the switches? A I was in the control room. (96a)

* * *

- See, he is not testifying. You have got to tell me of your own knowledge. Have you, yourself, any recollection of how long it was between the time he left and the time you heard the noise, which I assume was the time the accident occurred?
- A He stepped out, your Honor, and his one foot was actually in the elevator still, when all of a sudden I heard a big noise, like a grinding noise G-R-R-R, and (98a) that's all I remember. In other words, he could have turned around and perhaps grabbed me but it happened so fast. He had no time.
- Q You mean he was that close to you?

- A Yes, your Honor, his foot was on deck, and the other foot in the elevator actually when this happened.
- Q He almost went down with you, then, didn't he?
- A A split second he would have been in it, too.
- Q He would have been in it, too ?
- A Yes. Maybe the extra weight would have killed both of us.
- Q This grinding noise, can you give me a better description of it?
- A As I'm standing, your Honor, I heard something, G-R-R-R, that's all I heard, you know. Before I haven't heard anything. I haven't knowed anything. Otherwise I wouldn't be in that elevator, your Honor, no. (99a)

The noise that Imanuel heard was that of the parting of the cables. This occurred "within a minute or two" after Imanuel and Haag had been on the platform together for the first time. The fall of the platform was described as occurring within a split second.

There is no evidence of any damage to the cables at that time. There is nothing that could have delivered to the cables a horizontal blow. That blow must have taken place as Todd was moving objects into and out of the engine room through the elevator shaft, particularly the manifold.

The cables were struck in the shaft and they were struck by an object in the shaft.

The Court stated in its opinion:

"Both men were standing on the elevator platform checking a switch when Haag decided to leave to fetch a meter for further tests. The platform had been raised to its uppermost limits at the main deck. Just as Haag stepped off the lift platform and onto the main deck, Imanuel heard a loud grinding noise and the lift began a free fall down the shaft with Imanuel aboard. He was severely injured, having fallen about the equivalent of four stories, or about 60 feet. The immediate cause of the fall, or perhaps its result, was the substantially contemporaneous parting of the sustaining cables. They were severed, as though with a knife, by an impact occurring at the time of the accident. They were cut at about the same distance from the anchored ends." (45a)

In Finding #17 the Court stated:

"The sustaining cables of the platform lift were severed at the time of the accident to the plaintiff seaman." (50a)

In Finding #19 the Court stated:

"Imanuel heard a loud noise just before the platform fell. He was then standing on the platform and Chief Electrician Haag, about to leave the lift, had one foot on the platform and the other on the main deck.

If the lift platform had been two feet beneath that switch, as Haag and Imanuel recalled years later, it would have been impossible for Haag to have been straddling the deck and lift or to step off the platform onto the deck since the switch was yet another two feet below the deck." (50a)

The platform was not at the top because if it had been they could not have examined the limit switch. The testimony of Imanuel and Haag was that the platform was about two feet below the top of the shaft, not two feet below the limit switch. But whatever the distance was Imanuel got onto the platform from the weather deck and Haag got onto the weather deck from the platform and the platform was below the limit switch, not at its uppermost position.

The Court expressed the theory (Findings #34 and #38) that the platform might have been raised too high so that the cables could have been cut by or worked their way off the sheave at the top of the shaft. If that had occurred it necessarily would have happened instantly while Imanuel was still at the controls raising the platform and Haag was on the platform. There would have been absolutely no time for Imanuel to leave the control room, proceed to the upper deck and join Haag on the platform, and Haag not Imanuel would have fallen with the elevator and been the plaintiff

in this case.

Brierly and Thompson found the cables in good condition except at the point where they parted and that the break was clean. It is clear beyond any doubt that the cables parted because they had been struck by a horizontal blow by an object which in fact weakened them so that they parted the first time the two men were on the platform.

POINT II

THE FACTS AND CIRCUMSTANCES IN THIS CASE REQUIRE AN INFERENCE THAT THE DAMAGE TO THE CABLES WAS CAUSED BY ONE OF THE MANIFOLDS STRIKING THEM AS IT WAS MOVED INTO AND OUT OF THE ENGINE ROOM BY TODD.

The Court stated in Finding #15:

"***it is reasonable to infer that the lifting or lowering of machinery and repair items was done in a straight up and down fashion. * * * There is no evidence from which any inferences can be drawn that the manifold or any other objects moved through the shaft by (49a) Todd's crane dented the wall of the shaft, touched the cables or interfered in any way with the platform lift equipment; * * * Signal men to insure a reasonable lift were placed at the main deck opening and within the engine room to serve as eyes for the crane operator. In addition, when the nature of the lift warranted, a line was fixed to the end of the material to insure a steady lift." (50a)

An examination of the record shows that each of the four parts of this vital finding is clearly erroneous.

The Court drew inferences which were not supported by any evidence and refused to draw opposite inferences from unimpeached testimony as follows:-

- 1. Todd's leaderman We'sh admitted that he did not see the manifolds raised and lowered through the shaft and that when lifted in the customary manner of rigging, a manifold would not stay in a perfectly vertical position.

 (207a) The witnesses who could have testified to the lifting of the manifolds were not called by Todd nor their absence explained, hence such failure requires the contrary inference that their testimony would have been unfavorable to Todd.
- 2. There was evidence from which inference could be drawn that objects dented the shaft. There was Peuler's testimony on the point and clear photographs of the dents. (Lykes Ex. 7).
- 3. There was no proof that signal men were placed at the main deck opening. Welsh said this was customary but he did not see this and no Todd employees were called to establish this.

4. There was no proof that a line ever "was fixed to the end of the material to insure a steady lift".

Welsh did not even claim such practice as customary. The holdback he described was not a tag line and he testified clearly that even the holdback is turned loose and disconnected before the manifold would be raised through the shaft. (207a).

The finding that there was no evidence from which any inference could be drawn that the manifold touched the cables is a ruling of law and is contrary to well established principles.

ATLANTIC MUTUAL INSURANCE COMPANY vs. CLEARVIEW CLUB, INC., 264 Fed. Supp. 608, 610, 1968 A.M.C. 246, 248 involved an explosion caused by gas which had been spilled into the bilge of the ship. An explosion occurred thereafter. In holding that the spilling of the gas into the bilges was the cause of the explosion, the Court stated:

ondition of gasoline vapor which could be ignited by a static spark generated as earlier indicated, it was unnecessary for the plaintiff to show that the spark was actually produced since such an inference

could be reasonably drawn from the circumstances. Standard Oil of New York vs.

R.L.Pitcher Co., (1 Cir., 1923)289 Fed.678.

It was the duty of the Club's employee not to create a condition so dangerous that it could cause an explosion, even though he might not foresee the exact manner in which the cause might be set into operation."

In E.K.WOOD LUMBER CO. vs. ANDERSON, 81 Fed. (2d) 161 (9th Cir.) at about 11 P.M. the steering gear of the Schooner CASCADE jammed, when the helm was put hard to starboard the vessel turned to port. No one on the schooner saw any collision. At 12:30 A.M. the decedent's net was found by another fisherman; entangled in the net was a piece of decedent's boat. At 5 A.M. the bow of the decedent's boat was found. The body of the decedent was found ten days later. His watch was stopped at 11:15 P.M. The suit for Anderson's death was tried and the defendant moved for a directed verdict which was denied. The Court ruled that once the facts are established from which a presumption or inference logically flows or legally arises, whether such facts are established by circumstantial evidence or by direct testimony, it is the province of the jury to deduce the presumption or inference.

KELLY'S ISLAND LINE vs. THE CITY OF CLEVELAND,

47 Fed. Supp. 533, 540, involved a collision with a submerged object. The libellant as the owner of the sand
sucker sued the City of Cleveland to recover damages
caused by the sand sucker's striking a hidden obstruction
in the Cuyohoga River allegedly placed there by the City
of Cleveland while breaking up a bridge and building a
new one. The sand sucker collided with this hidden
object while passing through the draw of the new bridge.
The hidden object was a turn-table of the old bridge.
The Court said:

"It is a well established principle
that established facts may form the
basis of a reasonable inference. This
is particularly true when the established
facts can be susceptible upon one reasonable inference."

SCHULZ vs. PENNSYLVANIA R. R. 350 U.S.523,

1956 A.M.C. 737. In that case four tugs were tied up

together. Three were dark, one was partially illuminated

by a spotlight from the piez. Schulz had the duty of

taking care of all four tugs. To do this he had to

step from one tug to another in the dark except for such

help as he could get from his flashlight. One night he disappeared. Several weeks later his body was found in the water adjacent to the pier with the flashlight in his hand. He had drowned. The Court stated at 526:

"In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. Any reasonable men could also find from the discovery of Schulz's half robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties."

JOHNSON vs. U.S.A., 333 U.S.46; 1948 A.M.C. 218.

In this case the Petitioner and Dudder were working together with Dudder above the deck of the Petitioner handling blocks.

A block which Dudder was handling dropped striking and injuring the Petitioner. Dudder was not called. In holding that the facts justified an inference that Dudder was negligent the Court stated:

"The inquiry, however, is not as to possible causes of the accident, but whether a showing that petitioner was without fault and was injured by the dropping of the block is the

basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customary do such an act."

The testimony on behalf of Lykes is uncontradicted. The parting of the cables was due to damage caused by a blow which struck them horizontally while they were in the shaft. This damage could have been caused by the manifold striking the cables as it was being moved into or out of the engine room through the elevator shaft. There is no other possible cause. That is the only inference that can be drawn from the uncontradicted facts in the case.

POINT III

THE FAILURE TO CALL WITNESSES

The failure of Todd to call any fact witnesses or explain its failure to do so requires the inference that the testimony of those witnesses, if called, would have been unfavorable to Todd.

STANDARD TRANSPORTATION CO. vs. WOOD TOWING CORPORA-TION, (64 Fed.(2d) 282, 284; 1933 A.M.C. 1170, 1174) involved damages to a dock. The third officer who was on the bridge at the time was not called as a witness. The Court was not satisfied that everything had been done to locate him and stated:

"Under the circumstances, it is to be presumed that his evidence would not have been favorable to the libellant."

In AMERICAN OIL COMPANY vs. M/T LACON, 1973 A.M.C. 1900, 1905, the Court stated:

"The shipowner presented no evidence to rebut or explain the failure to heed signals sent from the pilot house. Neither the mate, the Master of the LACON nor anyone in the engine room testified. Failure to produce important witnesses in an admiralty action may raise the inference that the testimony would have been unfavorable to the party by whom they should have been called. Trans-Amazonica Iquitos, S.A. vs. Georgia Steamship Co., 335 F.Supp. 935;

O.F.Shearer & Sons vs. Cincinnati Marine SERVICE, INC. 279 F. (2d) 68 (6 Cir.)"

In Gerber & Company vs. SABINE HOWALDT, et al, 437

Fed. (2d) 580, 593, 1971 A.M.C. 539, 556 the condition of the hatch cover was at issue. Both sides examined the hatch cover on arrival of the vessel. The cargo owners did not call their surveyor. The Court's comment on this was:

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"The most important witness available to them on the subject of damaged hatches was their own surveyor, Captain Charles Bryan, who surveyed the SABINE HOWALDT shortly after her arrival at Wilmington, Delaware, at the same time she was checked by Captain Guistgaard, the defendant's surveyor. The defendant is entitled to the inference that Captain Bryan found the hatches and their covers in good condition as did Captain Quistgaard, because the plaintiffs did not call on Captain Bryan to testify and gave no adequate reason for not producing him."

In <u>SCOW JOAN R.</u>, 294 Fed.(2d) 272, 275, 1961 A.M.C. 2564, 2568, three scows were tied alongside of each other. The JOAN R was on the outside. She capsized dumping her own cargo and damaging the other scow. The Court stated:

"*** that an uncontrolled vessel which collides with another is presumed to have done so as a result of negligence."

In SOUTHERN CROSS S.S.CO., vs. FIRIPIS, 285 Fed. (2d) 651, 659, 1961 A.M.C. 621, 632, the plaintiff slipped on deck and sustained injuries. The Court stated:

593 "*** 'The unexplained failure to call material witnesses raises an inference that such witnesses, if permitted to

testify, would not support the defense as advanced by respondents.' We think that such an inference, in the circumstances of this case, was not unjustified.

See New York, 175 U.S.187, 204 (1899)."

DOUGLAS VICTORY BARGE D.B. 1845 - Coyle Lines, Inc.

Appellant vs. U.S.A., 195 Fed.2d, 737, 1952 A.M.C. 715, was
a collision case. The Court said:

"The Government did not produce as witnesses 741: the lookout on the forecastle head, nor any of the other seamen located there who might have seen the barge, nor did the Government make any showing in the testimony that these missing witnesses were not in the employ of the Government or that they were searched for or that they could not be located. The inference is clear that if they had been called their testimony would probably have been unfavorable to the Government. See Chicago & N.W. Ry. Co. vs. <u>Kelley</u>, 84 F.(2d) 569, 572; <u>The CASANOVA</u>, 297 Fed.658, 1924 A.M.C. 877; <u>THE MINCIO</u> 1936 A.M.C. 1765, 1771; EQUIPMENT ACCEPTANCE CORP. vs. ARWOOD CAN MFG. CO., 117 F. (2d) 442, 445; The ALGIE, 56 F. (2d) 388, 389, 1932 A.M.C. 993, WOODS v. GRAF, 84 F. Supp. 893, 895.

We can see no valid reason why the Government did not either take the testimony of the lookout on the forecastle head or account for his not being available. The observation of the Supreme Court made more than a century ago in CLIFTON vs. UNITED STATES, 45 U.S. 242, 247, seems here applicable.

If the weaker and less satisfactory evidence is given and relied on in support of a fact, when

it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory."

TUPMAN THURLOW vs. S.S.CASTILLO, et al, 490 Fed.(2) 302, 308, 1974 A.M.C. 51, 59. This case involves damage to refrigerated cargo. There was a book kept with information about the working of the refrigerating system called Kuelhtagebuch's Report (literally the Daily Cooler Book). In reference to the non-production of this book the Court stated:

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"The Kuehltagebuch is clearly material to the issue of due diligence. It might contain an unambiguous record of the temperatures in the hold, and it might also preclude the possibility of breakdown in the refrigeration equipment. The non-production of material evidence which is in the control of a party raises an inference that that evidence is unfavorable to that party. See e.g. United States vs. Delaware Bay and River Pilots' Ass'n., 1931 A.M.C. 217, 44 F. (2d) 1, 4, (3 Cir.) Cert. denied, 283 U.S.838 (1930) Motor Launch No.12, 1946 A.M.C. 669, 65 F.Supp.252, 253 (E.D.Pa., 1946), J.Gerber & Co. vs. SS SABINE HOWALDT, 1971 A.M.C. 539, 437 F.(2d) 580, 593, (2 Cir., 1971). This rule has been

said to be particularly applicable to suits in admiralty, where records are often crucial and records and witnesses often are in the control of one party. O.F.SHEARER & SONS vs. CINCINNATI MARINE SERVICE, INC., 279 F.(2d) 68, 73 (6 Cir., 1960)."

HELLENIC LINES, LIMITED vs. LIFE INSURANCE CORPORATION
OF INDIA, 526 Fed. (2d) 830, 832 1975 A.M.C. 2457.

This was a case for general average contribution from cargo. The vessel suffered a fracture of the crank shaft in the Red Sea 36 days after leaving New York.

The issue was whether the web deflection test had been taken. This Court stated at 832:

"As to these the judge was justified in concluding that one of two things occurred either they were never made or they were made and had become unavailable. If no tests were made, the Chief Engineer had failed to do what Hellenic's own marine superintendent had directed, and the vessel departed New York, her last loading port, without these having been made.

If they were made, as Evangelou testified, that judge was justified in inferring from their unexplained non-production that they were unfavorable. As Mr. Justice Story elegantly observed, such non-production is 'a very awakening circumstance, calculated to excite the viligance, and justify the suspicions of the court,' PIZARRO 15 U.S. 227, 241 (1817). We recently summarized the developed law on this subject in TUPMAN THURLOW CO. INC. vs.

S.S. CAP CASTILLO, 1974 A.M.C. 51, 57 490 F.2d 302, 308 (2 Cir., 1974) and need not repeat that analysis."

PHILADELPHIA-L-1, 44 Fed.(2d) 1,4, 1931 A.M.C.
217, 224:

4. "Though the pilot vessel's logbook was demanded, it was not produced, nor was its non-production sufficiently accounted for at the time of the trial. From such failure to produce the logs, an inference of fault naturally arises."

The failure of Todd to call any fact witnesses,
particularly the signalmen, not only justifies but requires
the inference that their testimony would have been unfavorable to Todd and would either have proved or tended to
prove that the manifold did strike the cables, either
when it was moved into the engine room or out of the
engine room through the elevator shaft.

POINT IV

TODD'S REPEATED FALSE ANSWERS TO INTERROGATORIES AND REQUESTS TO ADMIT ARE FURTHER REASONS FOR THE INFERENCE THAT THE MANIFOLD DID STRIKE AND DAMAGE THE CABLES

The importance of pre-trial discovery is being increasingly emphasized by the Courts as an aid to the

expeditious movement of litigation.

If failure to produce fact witnesses is a well established basis for drawing an unfavorable inference against that party, should not the increased importance of pretrial discovery require similar unfavorable inferences from repeated false answers during such discovery.

On June 4, 1973 Lykes addressed its original interrogatories to Todd asking whether Todd moved objects out of
the NANCY LYKES engine room between December 2nd and December
11, 1971 (16a). Todd thereafter denied any such movements
(18a).

Under date of August 1, 1974 Lykes' Requests to Admit were served on Todd. Among them is the following Question and Answer:

"1. The third-party Defendant, while the NANCY LYKES was at its yard in Galveston, Texas in 1971, moved objects out of and into the engine room through the engine room elevator shaft. (20a).

> ANSWER: Third-Party Defendant Todd Shipyards denies the truth of the matter set forth in Request No.1." (22a)

A number of other similar interrogatories were also denied in respect to the movement of manifolds through the shaft.

Under date of December 4, 1974 Lykes moved that the Requests to Admit be declared to have been admitted and that in the alternative it be permitted to take the depositions of witnesses in Galveston and that the third-party defendant be required to pay the expenses involved.

In response to the order of the Court Todd filed supplemental answers in which it admitted that the following objects were moved into and out of the engine room in December of 1971:

- 1. Regulator Valve.
- 2. Sanitary pump strainer.
- 3. No.1 and No. 2 sanitary pumps.
- 4. No. 2 Salt water overboard brine pump.
- Feed pump Suction Manifold.
- 6. 3" relief valve. (25a)

but further stated:

"9 (C) No objects were removed through
the elevator shafts. Access plates
were removed from the upper and lower
engine room areas. Openings were cut
in the bulkheads to allow passage of
material." (25a)

In support of these answers the affidavit of Thomas H. Healey, Esq. dated December 11, 1974, was submitted in which he stated:

"Your deponent has carefully reviewed all material at hand. Based upon the information from, among others, Mr. Joseph C. Kremenic, Todds Ship Superintendent, Mr. L.Gabriles, Ship Superintendent, and Mr. John Griggs, Contract Administrator, it would appear that Todd never moved material through the elevator shaft. Todd cut access holes in the side of the number three hold and holes between the number three hold and holes between the number three and four holds and in addition, unbolted an access plate so that the materials could be moved through these apertures. The elevator shaft was never used to move materials." (30a)

On March 25, 1975 Lykes took the depositions of several of Todd employees. As previously stated two of them, James W. Wolfe and Ignacio Ontiverous denied any memory of their working on the NANCY LYKES.

Wolfe, a leaderman testified:

- Q Did you do any work on the NANCY LYKES ?
- A I said, no knowledge of it.
- Q Do you mean, you don't remember whether you (257a) worked on it or not?
- A No. sir. (258a)

* * *

Q No memory of working on the NANCY LYKES ?

A No, sir. (258a)

When shown his statement (Ex.21-A) he admitted that the statement was correct.

- Mr. Wolfe, are the statements you made in this statement, plus the addition thereto, which is marked Wolfe 2, March 25, '75 for identification, correct"
- A Yes, sir. (260a)

In that statement Mr. Wolfe says:

"I recall the vessel NANCY LYKES. In fact, I have worked on this ship many times during my employment at Todd's.

Todd employees could not use the elevator during conversion for safety precautions. On the other hand, the elevator shaft was used as an access passage for lowering and aising materials to the lower engine room throughout the conversion. (265a)

In an Addenda dated July 11, 1975, Mr. Wolfe

"I made the above statement on June 18, 1974. I have read this copy of the statement again today. It is true and correct with the exception of one thing. We would not necessarily have one of the supervisors flagging the crane." (266a)

Ontiverous then testified:

stated:

- Q What is your occupation ?
- A Outside machinist for Todds.
- Q How long have you worked for Todds ?
- A Oh, about 27 years. (267a)

- Q Did you work on the NANCY LYKES when she was at Todd Shipyard being converted in 1971 ?
- A I don't recall working on it.
- Q You say you didn't work on it or you don't remember working on it ?
- A I say, I didn't recall. (267a)

On being shown his statement (Exhibit 22-A) he said:

- Q Is that statement signed by you?
- A Yes, sir.
- Q ... each page is signed by you ?
- A Yes, sir.
- Q And it was signed by you in your home ?
- A At my home.
- Q ... on June 14th, 1974 ?
- A Yes, sir.
- Q And you read it over before you signed it ?
- A Yes, sir.
- Q And you were furnished with a copy of it ?
- A Yes, sir. (269a)

He stated that reading his statement did not refresh his memory. (269a).

In his statement Ontiverous said: (Exhibit 22-a)

"The elevator shaft was approximately four feet by four feet. Since the electric elevator was not operative, we had to use this elevator shaft to lower and raise materials to the engine rooms, both lower and upper (270a)

"A crane is used to lower and raise materials through this elevator shaft.

* * * This elevator shaft was used strictly as an access passage for lowering and removing equipment." (271a)

The testimony of Wolfe and Ontiverous that they had no memory of working on the NANCY LYKES was obviously false. In June of 1974 they had a very clear memory of it. This along with the denial of the use of the elevator shaft in answers to interrogatories continued to accomplish the frustration of Lykes' discovery.

Only on March 26, 1975 when Lykes prepared to take the testimony of a U.S.Coast Guard inspector did Todd capitulate and stipulate that the access openings to the engine room were closed by October 15, 1971. It was not until counsel returned to Galveston and deposed Todd's foreman Ed Welsh on June 28, 1975 that the use of the shaft was established.

During trial when the Court's attention was called to Todd's repeated false answers the Court said:

"I don't doubt for a minute that in the course of the pretrial all kinds of people made a lot of silly mistakes and possibly verified papers which should never have been verified, ***."

It was obvious that the Court attached little significance to Todd's actions and in its opinion only referred to such subject when passing on Todd's application for attorneys' fees as a victorious third-party defendant.

Although absolutely no legal basis existed for the awarding of such fees, the Court used Todd's pre-trial "mistake" to justify declining such fees, stating:

"The Court declines to award such fees to Todd because during the early pretrial discovery procedures Todd mistakenly led Lykes to believe that it had not used the elevator shaft; whereas in the later development of pretrial discovery Todd was constrained to admit its use of the shaft in December, 1971. While the Court does not impugn the good faith of Todd, this unhappy volte-face on Todd's part created understandable suspicion on the part of Lykes and probably created needless expense and inconvenience for Lykes."

First of all it was not only during "early pre-trial discovery" that Todd answered falsely and kept its use of the shaft hidden. Lykes' first interrogatories were filed June 4, 1973 yet as late as December 11, 1974 Todd's counsel, Mr. Healey, in his affidavit denied that the shaft was used to move materials, and it was not until March 26, 1975 that he stipulated that the access openings had been closed by October 15, 1971, contrary to Todd's previous answers.

Surely neither the repeated false answers nor the sworn affidavit of Mr. Healey should have been treated as "silly mistakes."

In the case of McCullen v. Nouvelle Compagnie de

Paquebots, United States District Court for the Southern

District of New York No. 75 Civ. 3113, Judge Richard Owen

assessed \$2500 in costs upon the same attorneys representing

Todd in this case for "grossest negligence in defendant's irresponsible handling of answers to interrogatories".

Judge Owen noted that materials which were in the defendant's files were not turned over, although clearly asked for, reports in the files were clearly required and yet never sought by defense counsel and that the picture was "one of an attorney denying knowledge of everything although most of the materials were at hand." *

Moreover, the very recent decision of the United States

Supreme Court in National Hockey League v. Metropolitan

Hockey Club, Inc., 44 Law Week 3754, 96 S.C.R. 2778, demonstrates
that disregard of such responsibilities will no longer be
tolerated. There the Court imposed the extreme sanction of
dismissal with prejudice of a multi-million dollar lawsuit.

^{*} As yet unreported; copy of opinion attached.

The District Court had dismissed the action for failure to answer interrogatories after granting several extensions.

The Court of Appeals reversed, finding that the District Court had abused its discretion, but the Supreme Court sustained the District Court stating:

"After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions *** the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. *** That record shows that the District Court was extremely patient in its efforts to allow the respond0 ents ample time to comply with its discovery orders. Not only did respondents fail to file their responses on time, but the responses which they ultimately did file were found by the District Court to be grossly inadequate."

POINT V

THE FAILURE OF THE BROKEN ROPE SAFETY DEVICE TO FUNCTION DOES NOT PRECLUDE LYKES FROM RECOVERING AN INDEMNITY

Noel Thompson, the only witness who did testify as to the condition of the broken rope safety stated:

- Q Did you make an inspection of that device ? A Yes, I did.
- Q What did you find ?
- A That I could operate it, but of course

it had been damaged in the fall, so it was impossible to say whether the damage had occurred before or after the fact. But it would move.

- Q Did the bar actually turn when the pressure was released?
- A When the pressure was released, the bar would turn, yes, sir. (161a)

* * *

- Q Were you able to form any conclusion as to why this did not engage ?
- A No, sir. (162a)

It cannot be denied that the broken rope safety did not engage, but if the cables had not been damaged and caused to part the platform would not have fallen. The break in the cables was the sole cause of the accident.

CRUMADI vs. JOACHIM HENDRIK FISSER, 358 U.S.423,1959

A.M.C. 580. In that case the vessel was unseaworthy and the stevedore negligent. The Court decided the shipowner nevertheless was entitled to a full indemnity stating:

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover."

In WATERMAN STEAMSHIP v. DUGAN & McNAMARA, INC.

364 U.S.421, 1960 A.M.C. 2260, a longshoreman was

injured while engaged in unloading the AFOUNDRIA at the port of Philadelphia. The cargo consisted of bagged sugar.

The longshoreman's injuries resulted from the collapse of a vertical column of 100 pound bags which the unloading operators had left without lateral support.

As in the case at bar the petitioner settled the claim and by way of a third-party complaint sought to recover from the respondent stevedore the amount paid in satisfaction of the longshoreman's claim.

The Supreme Court restated the ruling which it had made in the CRUMADY case, saying:-

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

In <u>HENRY AND BRAYE</u> vs. <u>A/S OCEAN, et al</u>, 512 Fed.(2d)
401, 1975 A.M.C. 162 the Court again cited CRUMADY and stated:

407: "Applying these principles to the present case there was ample evidence to support the conclusion that Pittston's conduct was responsible for the plaintiff's accident and that Pittston was not prevented by the shipowner from rendering safe and workmanlike service that would have avoided the accident, even though the shipowner was negligent."

In RODRIGUEZ vs. OLAF PEDERSEN'S REDERI A/S, et al, 527 Fed. (2d) 1282, 1975 A.M.C. 2438, the Court stated:

"Although the Supreme Court in WEYERHAEUSER did not make clear what sort of conduct would be 'sufficient to preclude recovery,' we have held that in order to justify that result the shipowner's fault

'must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough.'

Clearly in the case at bar there was no claim that Lykes did anything to prevent Todd's from doing a workman like job.

In <u>HURDICH</u> vs. <u>EASTMOUNT SHIPPING CORP.</u>, et al., 359 Fed. Supp. 1222, 1973 A.M.C. 2388, 503 (Fed.(2d) 397) the shipowner's only claim as in this case was for an indemnity, yet the court reduced that to a contribution. In the District Court at the end of his opinion, Judge Lasker stated:

p.2391:

"We conclude that R.C.A. is liable to Eastmount for breach of its warranty of workmanlike service; by that, because Hurdich was injured as the result of the negligence both of R.C.A. and Eastmount, under the rule of SEABOARD, Eastmount is entitled to recover from R.C.A. fifty percent of the plaintiff's recovery against it, that

is \$37,500."

This was affirmed by the Court of Appeals. In that case the negligence of a shipowner came after the breach of warranty by R.C.A. In this case the unseaworthineness of the broken rope safety occurred prior to Todd's breach of warranty, and under the rule of the CRUMADY case should not preclude the shipowner from full indemnity. It is submitted, however, that if this Honorable Court feels otherwise it should do no more than reduce Lykes' claim to one for contribution.

POINT VI

THE COURT MADE A NUMBER OF FINDINGS OF FACT WHICH ARE NOT SUPPORTED BY ANY EVIDENCE OR WHICH ARE NOT RELEVANT TO ANY ISSUE IN THIS CASE.

In referring to the testimony of Brierly, the Court stated in #17 and #24 as follows:

"17. The sustaining cables of the platform lift were severed at the time of the accident to the plaintiff seaman."

* * *

#24. His testimony supported Todd's contentions that the cables of the platform lift were in satisfactory condition prior to the accident; and that the break in the cables occurred at the time of the accident."

The platform fell because the cables parted. This is clear because Imanuel heard a G-R-R-R noise at that instant.

There is no evidence that anything could have damaged the cables at that time and nothing in Brierly's testimony so indicated.

In #31 the Court stated:

"There is no evidence that elevator mechanics were ever employed by Lykes for the care and maintenance of the lift. The broken rope safety was incrusted with rust and dirt at the time of the accident."

There is no evidence to support that finding. The ship had a full engine room crew on board. Haag and Imanuel were electricians, not mechanics. The lubrication was done by the engineers or under their direction, except that Imanuel testified that he personally greased the cables with a glove before the vessel entered the Todd yard. (71a).

There was no lack of lubrication. Thompson testified that the sheaves under the platform were well lubricated (177a-178a) and that the sheave of the broken rope safety also moved freely. (170a). Brierly testified that the sheave on the shaft moved freely. (145a-146a).

In reference to the bolts on top of the guide rails

which will prevent the platform from going above them, the Court stated in #33:

"The purpose of these bolts is to stop the platform in the event the limit switch is overrun at the uppermost point of movement. Neither of these bolts was in place at the time of the accident."

The Court's conclusion necessarily was predicated on an examination of photographs taken in New Orleans on December 15, 1971 which showed these bolts removed. On the same day that the photographs were taken, however, the platform was taken off of the shaft, and to take it out these bolts had to be removed. There is no evidence that they were not in place prior to December 15th.

Further, this finding is not relevant because the platform was never moved up to that point. It had been stopped below the limit switch so that they could work on it. That is the testimony of Imanuel and Haag.

The Court states in #34:

"It appears probable from the testimony of DiCocco that without the restraining bolts at the top of the rails, and with the platform operated to its uppermost limits, the cables under the platform could have become disengaged from their sheave grooves,

thereby coming into contact with the machined edge of the sheave and creating a danger of cable cutting. This danger is increased if the sheave is restricted in free movement or actually seized. It is reasonable to infer that there was no lubrication or maintenance over a long period of time of the entire undercarriage of the platform including the broken rope safety device and the sheaves under the platform. It is also reasonable to infer that the cables may have been cut at the time of the accident because of the situation just described resulting in the broken rope safety device being inoperable and in the undercarriage sheaves being stuck fast."

There is no testimony to support any of these findings. If the cable had come in contact with the edge of the sheaves, the cutting would not have been horizontal, but oblique. There was no such cutting. Both cables were struck by a horizontal blow. There is no evidence in the record that anything could have done that except an object such as the manifold which was moved through the shaft.

There was no evidence of restriction in the free movement of the sheaves prior to the platform's fall to the bottom of the shaft. The sheaves were lubricated and so was the broken rope safety device.

In #36 the Court states:

"By closing the relays with a screwdriver, as Imanuel and Haag were doing prior to the accident, they by-passed all the safety devices which operated from the same circuit, thus allowing the lift to function without control and thereby creating a risk of reverse spooling and of contact between cable and cutting edges (e.g., 3 sheaves, sheave guard, machined opening in the bulkhead wall).

There was no failure of any electrical equipment involved in the case. Imanuel and Haag exercised manual control without any incident. Everything moved properly because they knew what they were doing. The cables did not come off any of the sheaves. There was no reverse winding or spooling.

In #37 the Court states:

"In operating the car with no safety or automatic features in circuit, Imanuel and Haag acted with utter disregard of their own safety. Todd contends that they caused a reverse winding of the cable on the drum by this procedure ultimately causing the cable to be cut by the sharp machine edge of the bulkhead after operating the lift to its extreme height. This contention has some support in the evidence, but this Court is not persuaded that an explicit finding to this effect can be substantiated or is necessary to support its conclusions."

There is no evidence of any reverse winding of the cables on the drum. All the evidence is to the contrary.

When Brierly and Thompson examined the cables they were on the drum in the grooves and that would not have been true if there had been reverse winding. Imanuel testified in rebuttal and photographs identified by him clearly show that several turns of the cables on the drum had never been off the drum. (Lykes Ex. 2). To begin a reverse winding all the cable would have to come off. This never occurred.

In #38 the Court sets forth what it regards as a plausible theory which has no evidence to support it.

The Court assumed that the cables came off the sheave at the top of the shaft, and that allowed the platform to drop, and then the cables striking the bulkhead in the control room parted and the platform went all the way down.

If this had happened the cables would have been off that shape before Imanuel left the control room. He had turned off the power, the brake on the drum was set, it could not move. Imanuel had time enough to go up to the weather deck, join Haag on the platform for the first time and examine the limit switch for a couple of minutes before the fall occurred.

If these cables had come off the sheave, or been cut by contact with the sheave as suggested by the Court in Finding #34, this would have occurred at the time the platform stopped. As previously stated, this could not have happened else Haag would have fallen with the platform and been the plaintiff in this action.

POINT VII

CONCLUSION.

Lykes submits that it has proved a prima facie case.

The uncontradicted evidence requires the inference that Todd damaged the cables and this damage resulted in their parting on December 10, 1971. Lykes is therefore entitled to an indemnity from Todd.

Respectfully submitted,

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CAPTE JUN 24 1976
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

GWENDOLYN J. McCULLEN, et ano.,

Plaintiffs,

-against-

NOUVELLE COMPAGNIE DE PAQUEBOTS, etc.,

Defendant.

75 Civ. 3113

MEMORANDUM AND ORDER

* 44 65

OWEN, District Judge

Plaintiffs move pursuant to 37(b) for a default judgment on the ground that defendant has failed to comply with the Court's order of November 14, 1975 directing that answers be given to plaintiffs' interrogatories.

It is virtually acknowledged by defendant's attorneys, and in any event I would and do conclude that there has been the grossest negligence in defendant's irresponsible handling of answers to interrogatories propounded by plaintiff. Materials which were in defendant's files were not turned over, although clearly asked for; reports in the files of defendant's carrier were clearly required and yet never sought. The picture is one of an attorney denying knowledge of everything

although most of the materials were at hand. I find this is a shocking method of responding to interrogatories in the United States District Court. The Magintrate has recommended that the answer be stricken and that an inquest be ordered as a penalty for this. I decline to order that extreme remedy because although I find gross negligence, I do not find a wilful violation of the Court's order, and I do not find that defendant itself was implicated in counsel's conduct. However, I deem it fully appropriate in the circumstances to award reasonable costs to plaintiff's counsel for all of its expenses involved in this collateral proceeding and I fix these expenses at \$2,500, to be paid by counsel for defendant and not by defendant itself.

Full and complete answers to all outstanding interrogatories are to be furnished before July 15, 1976.

The foregoing is so ordered.

June 23, 1976.

United States District Judge

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IS HEREBY ADMITTED.

DATED:

Attorney for

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HEALEY & STONEBRIDGE 19 RECTOR ST., N.Y., N.Y. 10006